IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 574 OF 1997

1. Eknath Pandurang Kamathe
52 yrs. Occ. Agri.
2. Keshav Pandurang Kamathe
age 45 yrs. Occ. Agri.
Both r/at Jejuri,
Tal. Purandar, Dist. Pune .. Petitioners

Vs.

Rajaram Kondiba Shinde
83 yrs., Occ. Nil, Jejuri
Tal. Purandar, Dist. Pune .. Respondent

Mr. A.R.S. Baxi for Petitioners.

CORAM: B.H. MARLAPALLE, J.
Date : August 10, 2005.

ORAL JUDGMENT :

1. Regular Civil Suit No.52 of 1992 came to be decreed with costs by the learned Civil Judge, Junior Division at Saswad on 29/10/1992 and the defendant was directed to remove the suit shed and hand over the actual vacant possession of the suit site to the plaintiffs on or before 1/12/1992, failing which the plaintiffs will be at liberty to have the said relief and to have the shed removed by filing the Execution Petition at the costs of the defendant.

2. On or about 30/11/1992 the defendant submitted an application under Order IX Rule 13 of C.P.C. for setting aside the ex parte decree passed in Regular Civil Suit No.52 of 1992. The learned Civil Judge, Junior Division, Saswad vide his order dated 2/9/1993 held that the said application was not maintainable as the decree was passed either under Order VIII Rule 5(2) or Order VIII Rule 10. This order came to be challenged in Misc. Civil Appeal No.405 of 1993, which came to be allowed by the learned 5th Additional District Judge, Pune vide his Judgment and Order dated 11/4/1997. The order passed by the trial court was set aside and the application for setting aside the ex parte decree was allowed. The ex parte decree was also set aside and opportunity was given to the defendant to file Written Statement and thereafter the suit would be decided on merits. This order of the Lower Appellate Court passed on 11/4/1997 is subject matter of challenge in the instant revision application.

3. The trial court in support of its order dated 2/9/1993, while rejecting the application filed under Order IX Rule 13, referred to a decision of this court

in the case of Rashtriya Chemicals and Fertilizers Ltd. vs. Ota Kandla Pvt. Ltd. reported in **1992 Maharashtra Law Journal 1266**. Whereas the Lower Appellate Court held that the application was maintainable as the decree was not passed under Order VIII Rule 5 or Rule 10 and, in fact, it was a decree under Order XVIII of C.P.C. In the say filed to the application for setting aside the ex parte decree, the plaintiff had pointed out that after the suit was filed on 25/3/1992 summons were served to the defendant and the defendant appeared before the trial court and sought adjournment for filing the Written Statement. The suit appeared before the trial court on 7/4/1992, 22/4/1992, 2/5/1992, 11/6/1992, 19/6/1992 and 23/6/1992 but no Written Statement was filed and, therefore, on 4/7/1992 the trial court passed the following order :-

> "Deft. called. Absent. Say & W.S. not filed. Application for granting time already rejected. Suit to proceed without W.S. and Say."

3A. Thereafter the suit appeared before the trial court on 1/8/1992, 9/9/1992, 28/9/1992, 30/9/1992, 13/10/1992, 15/10/1992 and 19/10/1992 for recording evidence of the plaintiff. Finally, on 29/10/1992 the suit was decided. Thus, the defendant had not filed W.S. in spite of more than one opportunities given to him and the suit was directed to be proceeded without W.S. The plaintiff's evidence was recorded and the suit was decreed ex parte. As per the Lower Appellate Court it was not a decree under Order VIII Rule 5 of C.P.c. and, therefore, the application submitted under Order IX Rule 13 was maintainable. The Lower Appellate Court further held that sufficient cause was shown for condonation of delay in submitting the appeal.

4. Rule 5 and 10 of Order VIII and Rule 13 of Order IX of C.P.C. are reproduced as under :-

> "5.**Specific denial.**- (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:
>
> . Provided that the Court may in its

discretion require any fact so admitted to be proved otherwise than by such admission.

(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved.

(3) In exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader.

(4) Whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.

10. **Procedure when party fails to present written statement called for by Court.**- Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment, a decree shall be drawn up.

13. **Setting aside decree ex parte against defendant.**- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding

with the suit:

. Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

. Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

. Explanation.- Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree."

4A. Rule 6(a) of Order IX of C.P.C. states that the court may make an order that the suit be heard ex parte if it is proved that the summons was duly served. Rule 11 of Order IX states that where there are more defendants than one and one or more of them appear, and the others do not appear, the suit shall proceed, and the court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear. Rule 13 Order IX provides for setting aside a decree passed ex parte against the defendant. In the instant

case the summons was served on the defendant, he caused his appearance, submitted an application for time to file W.S., time was granted on more than one occasion and he did not utilise the same. On 4/7/1992 the court passed an order to proceed with the suit without W.S. and Say. Thereafter the suit appeared before the trial court on half a dozen dates and the evidence of the plaintiff was recorded. As per Order VIII Rule 5(2) when the defendant has not filed a pleading, it shall be lawful for the court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under disability, but the Court may, in its discretion, require any such fact to be proved. Rule 10 of Order VIII is distinct from Rule 5 of the same order. It would be safe to accept that in the instant case the decree was passed under Order VIII Rule 5(2) of C.P.C. and the view taken by the Lower Appellate Court to the contra is grossly erroneous. Mrs. Baxi the learned counsel for the petitioners rightly relied upon the following decisions of this Court:-

(a) Rashtriya Chemicals and Fertilizers Ltd. vs. Ota Kandla Pvt. Ltd. - **1992 Mah. L.J. 1266**.

(b) State Bank of India vs. Himalayan Tiles & Marble Pvt. Ltd. and ors. - **1994(2) Bom.C.R. 399**.

(c) Rambrish K. Shukla and anr. vs. Municipal Corporation of Gr. Bombay and anr. - **(1999) Vol. 101(2) Bom.L.R. 668**.

5. The application filed by the defendant under Order IX Rule 13 was, therefore, not maintainable. The view taken by the Lower Appellate Court is indefensible. The same is required to be set aside by confirming the view taken by the trial court.

6. In the result, this revision application succeeds and the same is hereby allowed. The impugned order dated 11/4/1997 passed by the Vth Additional District Judge, Pune in Misc. Civil Appeal No.405 of 1993 is hereby quashed and set aside. The Misc. Civil Appeal No.405 of 1993 is hereby dismissed and the order passed by the trial court, rejecting M.A. No.18 of 1992 as not maintainable, is hereby confirmed. Rule made absolute accordingly with no order as to costs.

(B.H. Marlapalle,J.)